BRIEF OF AUTHORITIES ON BEHALF OF PETITIONER.

There are two fundamental questions which this petition raises.

I.

The Supreme Court of Georgia has held in effect that in the trial of one accused of a misdemeanor there is no discrimination against him if he is tried before a jury of five (5) selected from a panel of twelve (12) tales jurors, from which the accused has four (4) peremptory strikes and the State three (3), while another, accused of the same misdemeanor, is tried before a jury of twelve (12) selected from a panel of twenty-four (24) tales jurors, from which the accused has seven (7) peremptory strikes and the State five (5), an unanimous verdict being required in both cases.

The Court likewise held in effect that there was no discrimination against petitioner even though he was denied the right to seek a new trial on grounds of newly discovered evidence, while another accused of the same misdemeanor might have that right.

The Court held in effect that there was no discrimination against petitioner though he was denied the right to seek a change of venue, while another accused of the same misdemeanor might avail himself of that right.

The Court held in effect that there was no discrimination against petitioner though a burden of an involved and expensive method of appeal to have his rights finally determined was placed upon him from which another accused of the same misdemeanor might be relieved.

The Court held in effect that there was no discrimination against petitioner though the law was not complied with in the selection of the Court in which he was tried, the

petitioner had no choice in the matter of selecting the Court, and said selection was left to the capricious whim of the Solicitor General who, under the law, has no right to select such court.

How can it be said that there is not discrimination between petitioner and another accused of the same offense, living in the same County, when petitioner is arbitrarily denied the rights given another, as above set out?

The Supreme Court of Georgia reached its decision without applying its own definition of "due process of law." In *Lamar* v. *Prosser,* 121 Ga. 153, at 154, the Court said:

> " 'Due process of law,' as required by the fourteenth amendment to the constitution of the United States, means only that a man is to be tried, as every other man is tried. * * *"
>
> "Due process of law is secured by laws operating on all alike, without discrimination. Caldwell *v.* Texas, 141 U. S. 211."

With respect to the definition of "equal protection of the law," the court in *Baugh* v. *City of LaGrange,* 161 Ga. 80, at 81, said:

> "It is only in cases where laws are applied differently to different persons under the same or similar circumstances that the equal protection of the law is denied."

It is respectfully submitted that had the court applied its own definitions of these two phrases to the instant cause, it could not have arrived at the decision here complained of.

It is conceded by petitioner that a State may regulate the practice and procedure in its courts, even to the extent of dispensing with a jury trial (*Hurtado* v. *California,* 110 U. S. 516), but unless those regulations are applied in a like manner on all persons in like circumstances or simi-

larly situated, then they become discriminatory and amount to a denial of equal protection of the law and due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

In *Maxwell* v. *Dow*, 176 U. S. 581, at page 604, this Honorable Court through Mr. Justice Peckham said:

> "It appears to us that the questions whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors, and whether in case of an infamous crime a person shall only be liable to be tried after presentment or indictment of a grand jury, are eminently proper to be determined by the citizens of each State for themselves, and do not come within the clause of the amendment under consideration, *so long as all persons within the jurisdiction of the State are made liable to be proceeded against by the same kind of procedure and to have the same kind of trial, and the equal protection of the laws is secured to them.*" (Emphasis added.)

See also:

> *Caldwell* v. *Texas*, 137 U. S. 692;
> *Leeper* v. *Texas*, 139 U. S. 462.

In the *Caldwell* case it was held that no State can deprive particular persons or classes of persons of equal and impartial justice under the law, without violating the provisions of the Fourteenth Amendment to the Constitution of the United States, and that due process of law, within the meaning of the Constitution, is secured *when the laws operate on all alike, and no one is subjected to partial or arbitrary exercise of the powers of government.*

It is respectfully submitted that in the instant case the laws complained of do not operate on all alike, and petitioner has been subjected to partial and arbitrary exercise of the powers of government.

In view of the foregoing, it can hardly be said that a substantial Federal question has not been presented.

II.

The second question presented for review is whether or not the denial of certain privileges and immunities guaranteed by the Constitution of the State of Georgia is likewise a denial of certain privileges and immunities guaranteed by the Constitution of the United States, so as to present a substantial Federal question for determination by this Honorable Court.

Obviously, the Supreme Court of Georgia misconstrued petitioner's assignment of error with respect to the introduction and admission of certain evidence illegally obtained. This assignment was not based on the Fourth and Fifth Amendments to the Constitution of the United States, nor was it based on the application of the "due process" clause of the Fourteenth Amendment to the Fourth and Fifth Amendments. Rather, it was based solely on a violation of the Fourteenth Amendment to the Constitution of the United States by depriving petitioner of the rights and privileges guaranteed him by the Constitution of the State of Georgia and laws enacted in pursuance thereof.

To justify the jurisdiction of this Honorable Court, petitioner must have been deprived of fundamental rights, the observance of which is indispensable to the liberty of the citizen. (*Allen* v. *Georgia*, 166 U. S. at 141.)

Article I, Section 1, Paragraph III of the Constitution of the State of Georgia, provides:

> "No person shall be deprived of life, liberty, or property, except by due process of law."

Article I, Section 1, Paragraph VI of said Constitution provides:

> "No person shall be compelled to give testimony tending in any manner to criminate himself."

Article I, Section 1, Paragraph XVI of said Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath, or affirmation, particularly describing the place, or places, to be searched, and the persons or things to be seized."

Petitioner has been and is being denied the rights and privileges guaranteed by the foregoing provisions of the Constitution of the State of Georgia, and in being so denied, can it be doubted that he is likewise being denied the guarantee of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States?

The words "due process of law" refer to that law of the land in each State which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. (*Ex parte Kemmler,* 136 U. S. 436.) The words are intended to give increased security against arbitrary deprivation of life or liberty. (*Hurtado* v. *California,* 110 U. S. 535.)

While it is true that this Court has held that "the exemption from compulsory self-incrimination is not a privilege or immunity of national citizenship guaranteed by this clause of the 14th amendment against abridgment by the States" (*Twining* v. *New Jersey,* 211 U. S. 78), when the exemption is guaranteed by the Constitution of the State of which petitioner is resident, it can hardly be said that the denial of the guarantee is not a denial of due process.

Under the test as laid down in *Palko* v. *Connecticut,* 302 U. S. 319, as to whether a right comes within the purview of the 14th Amendment, it must be of "the very essence of

a scheme of ordered liberty" * * * or a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." It is submitted that the denial of the constitutional guarantee of the Constitution of the State of Georgia with respect to the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, is a violation of a principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental, thus bringing it within the purview of the Fourteenth Amendment.

That use by a State of improperly obtained evidence may constitute a denial of due process of law was upheld recently by this Court in *Chambers* v. *Florida,* 84 L. Ed. 419, citing *Brown* v. *Mississippi,* 297 U. S. 278.

A substantial Federal question has thus been raised.

Respectfully submitted,

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